



ENVIRONMENTAL RESTORATION

U.S. Army Environmental Center

NATURAL RESOURCE INJURY & DAMAGES

Natural Resource Legal Authorities

Comprehensive Environmental Response Compensation and Liability Act (CERCLA), the Oil Pollution Act, and the Clean Water Act (CWA) all contain provisions on natural resource injuries and damages (NRI NRD). These laws allow natural resource trustees to assess damages to natural resources resulting from a discharge of oil or a release of a hazardous substance covered under CERCLA or the CWA. Specifically, under CERCLA 107(a)(4)(C), Department of Defense (DoD), like any other responsible party, may be liable for “damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from the release of a hazardous substance.”

What Are Natural Resources and How Do You Injure Them?

Natural resources are broadly defined to include “land, fish, wildlife, biota, air, water, groundwater, drinking water supplies and other such resources.”

When oil or CERCLA hazardous substances (but not pollutants or other contaminants) enter the environment, they may harm natural resources, reduce the public’s use or enjoyment of them and/or degrade an ecological function which they provide. When the changes to the resource are adverse and measurable, the affected resource is said to be injured. Injury to natural resources serves as the basis for a damage claim. The Department of Interior (DOI) has published injury definitions in 43CFR Part 11.

Example of Injury Definitions:

- ❖ **Surface Water** — concentrations and duration of substances in excess of applicable water quality criteria (CWA)
- ❖ **Groundwater** — concentrations of substances in excess of drinking water standards (Safe Drinking Water Act)
- ❖ **Air** — concentrations of emissions in excess of standards for hazardous air pollutants (Clean Air Act)
- ❖ **Geological** — concentrations of substances sufficient to decrease the water-holding capacity such that plant, microbial or invertebrate populations are affected
- ❖ **Biological** — concentrations of substances sufficient to cause the biological resource or its offspring to have undergone at least one of the following adverse changes in viability: death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions or physical deformations



Lead Response Agent Responsibilities

CERCLA Section 104(b)(2) requires the lead agency to promptly notify the appropriate federal and state natural resource trustees of potential damage to natural resources resulting from releases under investigation. In the case of DoD, the “responsible party” side of DoD should notify all applicable trustees, including its own internal trustee representative. DoD shall seek to coordinate their plans, assessments and investigations with both federal and state trustees.

The Secretary of Defense has delegated trusteeship of Army property to the Deputy Assistant Secretary of the Army for Environment, Safety and Occupational Health (DASA[ESOH]). The DASA (ESOH) as Army Trustee, may further delegate his trustee-ship duty, if warranted. Installation inquiries concerning NRI or NRD issues, above and beyond regular notification and coordination, should be relayed up the chain of command to DASA(ESOH), with a copy furnished to the U.S. Army Environmental Center (USAEC).

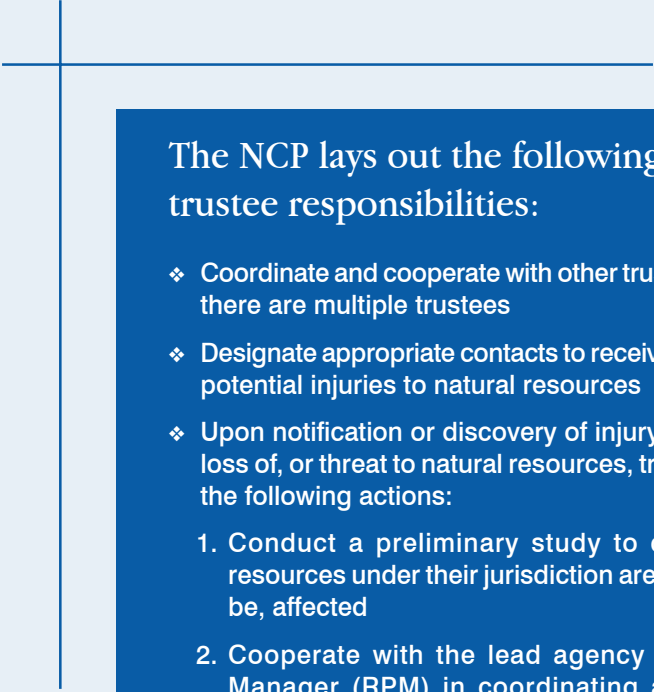
Who Are The Natural Resource Trustees?

By Executive Order 12580 and in the National Contingency Plan (NCP), the President has designated certain executive officers as federal trustees for natural resources. These federal trustees include the Secretaries of Defense, Interior, Commerce, Agriculture and Energy. Each state governor has designated one or more state agencies to serve as trustee for resources under state management or control. Tribal chairmen, or their designees, serve as trustees for tribal interests. The U.S. Environmental Protection Agency (EPA) is not a natural resource trustee; however, the EPA often works in close cooperation with trustees.

DoD Natural Resource Trustee Responsibilities

The Secretary of Defense has trusteeship over all lands owned or managed by the DoD, including facilities operated by the Navy, Army, Air Force and Defense Logistics Agency. Where DoD facilities contain hazardous waste disposal sites, the agency managing the property may have responsibilities as a natural resource trustee, the lead response agent and be held accountable as a responsible party. The latter two roles may often conflict with the natural resource trustee role.

It is important for DoD to coordinate with natural resource trustees (including its own trustee representatives) throughout the cleanup process. Coordination can minimize the amount of injury that might remain after, or be caused by, the cleanup and less time before resources return to baseline conditions. Damages may be less for lost public uses when restoration to baseline is faster.



The NCP lays out the following trustee responsibilities:

- ❖ Coordinate and cooperate with other trustees at sites where there are multiple trustees
- ❖ Designate appropriate contacts to receive notification about potential injuries to natural resources
- ❖ Upon notification or discovery of injury to, destruction of, loss of, or threat to natural resources, trustees should take the following actions:
 1. Conduct a preliminary study to determine if trust resources under their jurisdiction are, or potentially may be, affected
 2. Cooperate with the lead agency Remedial Project Manager (RPM) in coordinating assessments and investigations
 3. Carry out damage assessments
 4. Prepare and implement a plan for restoration, rehabilitation, replacement, or acquisition of equivalent natural resources

What Damages May A Trustee Recover?

When an injury occurs, the trustees seek to restore the injured resources to a baseline condition. The baseline condition is defined as the condition that would exist except for the hazardous substance or oil release. Replacement or acquisition of equivalent resources may be substituted in appropriate circumstances. Additional measures may also be appropriate to address lost uses of resources (referred to as lost services) during the period of injury. Responsible parties may either restore the injured resources and address the loss of services, or they may simply make a payment (i.e., pay damages) to the natural resource trustee(s) equal to the sum of the baseline restoration program cost and the value of lost services.

Responsible parties are liable for the following:

- ❖ Damages based on injuries occurring from the onset of a release or 1980, whichever is later, through the recovery period
- ❖ Damages remaining after the cleanup is complete
- ❖ Any injuries that are caused by the cleanup itself
- ❖ Costs of emergency restoration efforts
- ❖ Costs of natural resource assessments
- ❖ Interest on the damage amount

However, any mitigation of injury that a responsible party takes as part of the cleanup is subtracted from their liability.

How Is This Different From Site Cleanup?

Collecting natural resource damages and restoring injured resources is not a “second cleanup.” There are three important factors that make a damage claim different from a cleanup. These factors are:

- ❖ Cleanups focus primarily on eliminating or reducing risk to public health and the environment. Trustees, focusing on complete restoration rather than unacceptable risk, must base their claim for damages on injuries to natural resources, not risks to human health or the environment
- ❖ Trustees must base a damage claim only on injuries that are not fully remedied by the cleanup
- ❖ Trustees can collect additional damages for the public’s lost use of natural resources and loss of ecological services from the time of injury until restoration is complete. Cleanup actions cannot address these “interim” losses.

Two Important Concepts — Baseline & Services

Baseline — A term used to describe environmental conditions that would exist “but for” a release of oil or hazardous substances. Baseline takes into consideration all other factors that might affect natural resources in a negative way, and thus, is unlikely to represent a “pristine” condition.

Services — A term used to describe the ecological functions and human uses of natural resources. For example, a fishery can provide services as a recreational resource, an economic resource and a source of food for birds and mammals. When a responsible party provides direct compensation for lost uses, it generally takes actions that will provide services comparable to those that have been or are being lost.

The Natural Resource Damage Process — Department of Interior (DOI) Regulations

DOI has published regulations covering the Natural Resource Damage Assessment (NRDA) process (43CFR Part 11). The NRDA process has three primary phases: Preassessment, Assessment, and Post Assessment.

The purpose of the Preassessment phase is to give the trustees enough information about the release to determine if a full assessment is required. The Preassessment Screen document is prepared using readily available information (i.e., no new studies or data are collected).

The Assessment Phase consists of four elements: Assessment Plan, Injury Determination, Injury Quantification, and Damage Determination. During this phase, the trustees (and probably the responsible party) plan the assessment to ensure that it is conducted appropriately, establish that one or more resources have been injured as a result of the discharge or release, establish the extent of the injury, and finally, determine the appropriate compensation for that injury (i.e., the “damages”). The results of the Assessment Phase are published in an NRDA Report.

In the Post-Assessment Phase, plans or procedures are laid out to delineate the manner in which the injured natural resources will be either restored or replaced or how the equivalent of the affected resources will be acquired. A restoration plan is developed that directs how the damages will be spent to accomplish the restoration. The trustees must use the damages in the same geographic area as the injury occurred (i.e., the same watershed may be appropriate, but a watershed area hundreds of miles away is inappropriate). Any damages received cannot be used to compensate private businesses or individuals for economic or other losses.

More Information

Additional questions can be
addressed to:

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DoD's NRI Policy

On May 2, 2000, DoD published guidance on the Integration of NRI Responsibilities and Environmental Restoration Activities. This policy's purpose is to provide guidance to each of the components regarding their responsibilities to address NRI at sites where DoD is both a natural resource trustee and, as a responsible party, the lead response agency for environmental cleanup actions. DoD stresses, wherever possible, the services should redress NRI as part of the site assessment, investigation and remedy selection and implementation. DoD notes that while an Ecological Risk Assessment (ERA) and a NRDA study are intended to address different concerns, they both address injury. In appropriate situations, DoD suggests expanding the ERA to collect additional information regarding NRI and coordinating this idea with the other trustees during the design of the ERA.

DoD's NRI policy is “interim”; and DoD plans on preparing implementing guidance, although it has provided no timetable for this effort. The Army also has plans to create implementing guidance. However, until that guidance is prepared and published (no schedule is available), questions or issues related to NRI, NRD or their integration with ERA, should be forwarded up the chain of command to DASA(ESOH), with a copy furnished to USAEC.